STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK LEVI BROWN,

Defendant-Appellant.

UNPUBLISHED
January 27, 2005

No. 250582
Wayne Circuit Court
LC No. 03-005383-01

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant was charged with second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f(2), and possession of a firearm during the commission of a felony, MCL 750.227b(1). Following a jury trial, defendant was found guilty of voluntary manslaughter, MCL 750.321, and the two weapons offenses. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to prison terms of 129 months to 30 years on the manslaughter conviction and five to ten years on the felon in possession conviction, which sentences were to be served concurrently to one another and consecutively to the mandatory two-year term for felony-firearm. Defendant appeals his convictions as of right. We affirm.

Defendant first contends that the trial court improperly nullified his peremptory challenge against a juror after sustaining the prosecutor's objection that defense counsel was exercising challenges in a racially discriminatory manner. This issue has been preserved, having been raised and addressed below. *People v Ricky Vaughn*, 200 Mich App 32, 40; 504 NW2d 2 (1993).

A prosecutor cannot use peremptory challenges to strike blacks from a black defendant's jury simply because the jurors are black. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *People v Barker*, 179 Mich App 702, 707; 446 NW2d 549 (1989). By the same token, "a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethic origin, or race." *United States v Martinez-Salazar*, 528 US 304, 315; 120 S Ct 774; 145 L Ed 2d 792 (2000).

The first step in "determining whether there has been an improper exercise of peremptory challenges in a criminal or civil proceeding" is for the opponent of a peremptory challenge to make out a prima facie case of racial discrimination. *People v Bell (On Reconsideration)*, 259 Mich App 583, 590; 675 NW2d 894 (2003), lv gtd 470 Mich 870 (2004). "To establish a prima facie case of discrimination based on race, the opponent of the challenge must (1) show that

members of a cognizable racial group are being peremptorily removed from the jury pool and (2) articulate facts to establish an inference that the right to remove jurors peremptorily is being used to exclude one or more potential jurors from the jury on the basis of race." *Id*. at 590-591. In deciding whether a prima facie case has been made out, the court must consider all relevant circumstances, including whether there is a pattern of strikes against jurors of a particular race and the questions and statements by the party striking the jurors during voir dire and in exercising his peremptory challenges. *Barker, supra* at 705-706.

If the first step is met, "the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation" for the strike. *Bell, supra* at 590. The explanation offered by the proponent need not rise to the level needed to justify a challenge for cause. *Barker, supra* at 706. The reason offered need not be persuasive or even plausible as long as it is neutral, and "unless a discriminatory intent is inherent in the reason offered, . . . the reason will be deemed race-neutral." *Clarke v Kmart Corp*, 220 Mich App 381, 384; 559 NW2d 377 (1996). "If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination . . . ." *Bell, supra*. This Court reviews the trial court's ruling for an abuse of discretion. *People v Howard*, 226 Mich App 528, 534; 575 NW2d 16 (1997). This Court is to give great deference to the trial court's findings on this issue because they turn in large part on credibility. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319; 553 NW2d 377 (1996).

Defendant did not utilize his peremptory strikes to remove all white jurors from the panel, which is evidence against a finding of discrimination. *People v Williams*, 174 Mich App 132, 136-137; 435 NW2d 469 (1989). However, apart from wholly eliminating members of a particular race from the jury, "a 'pattern' of strikes against" members of a particular race "included in the particular venire might give rise to an inference of discrimination." *Batson, supra* at 97; *Bell, supra* at 591. The prosecutor made out a prima facie case of discrimination based on an established pattern of strikes, showing that defendant exercised each of ten consecutive peremptory strikes against white jurors. Defendant was unable to articulate a race-neutral reason for the last strike and thus the trial court did not abuse its discretion in sustaining the prosecutor's objection.

Defendant next contends that the prosecutor failed to produce sufficient evidence to sustain the manslaughter verdict. Defendant does not dispute the sufficiency of the evidence as to the necessary elements of voluntary manslaughter itself. Rather, he contends only that the prosecutor failed to prove that the killing was not done in self-defense. No special action is necessary to preserve this issue. *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987).

A killing in self-defense "is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502, 508; 456 NW2d 10 (1990). When a defendant uses deadly force, the test for determining whether he acted in lawful self-defense has three parts: 1) defendant honestly and reasonably believed that he was in danger, 2) the danger which he feared was serious bodily harm or death, and 3) the action taken by the defendant appeared at the time to be immediately necessary, *i.e.*, defendant is only entitled to use the amount of force necessary to defend himself. CJI2d 7.15; *Heflin, supra*. "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

"The necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). This is because if an attack can be safely avoided, the use of deadly force is not necessary. *Id*. at 129. However, a defendant is not "required to retreat from a sudden, fierce, and violent attack" or "from an attacker who he reasonably believes is about to use a deadly weapon." Under such circumstances, as long as the defendant honestly and reasonably believes that it is necessary to exercise deadly force in self-defense, "he may stand his ground and meet force with force." *Id*. at 119. Regardless of the circumstances, if the defendant is attacked in his own home, he "is *never* required to retreat where it is otherwise necessary to exercise deadly force in self-defense." *Id*. at 120 (emphasis in original).

Defendant claimed that he shot the decedent, Taj-Ma Austin, during an argument in defendant's apartment after Austin threatened him and made a move toward a rifle standing against a wall. The evidence conflicted as to whether defendant had a rifle in his apartment. Other evidence showed that defendant shot Austin during a physical altercation after Austin dared him to shoot. Prosecution witnesses testified that Austin was standing in the doorway of defendant's apartment at the time he was shot, which was consistent with the location of the body. In addition, the medical examiner testified that the shot would have rendered Austin immediately unconscious, the implication being that he would have fallen where he stood when shot. Such evidence, if believed, was sufficient to prove beyond a reasonable doubt that defendant did not have an honest and reasonable belief that Austin was about to use a deadly weapon against him and thus did not act in self-defense.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello